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In The

Supreme Court of the United States

October Term 1996

RODNEY WAGSTAFF,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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1. Whether the Fourteenth Amendment's guarantee of due process is violated when a person is convicted of aggravated involuntary manslaughter under Virginia Code Section 18.2-36.1(B) without the evidence necessary to establish the elements of that offense.

2. Whether the Fourteenth Amendment's guarantee of due process is violated when a trial court refuses to grant a mistrial based on improper statements made by the prosecution during closing argument.

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PETITION FOR A WRIT OF CERTIORARI

Rodney Wagstaff respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINION BELOW

By an unpublished opinion dated April 25, 1996, (App., infra, A-11), a judge of the Court of Appeals of Virginia denied Mr. Wagstaff's petition for appeal. Pursuant to Virginia Code Section 17-116.05:2(D), Mr. Wagstaff demanded consideration of the petition for appeal by a three-judge panel of the Court of Appeals of Virginia, and on June 27, 1996, the three-judge panel of the Court of Appeals of Virginia affirmed the original denial of the petition for appeal. (App., infra, A-19). Mr. Wagstaff appealed to the Supreme Court of Virginia, and the Supreme Court of Virginia refused his petition for appeal on December 20, 1996, (App., infra, A-1), and denied his petition for rehearing on February 28, 1997. (App., infra, A-21).

JURISDICTION

The judgment of the Supreme Court of Virginia refusing Mr. Wagstaff's petition for appeal was entered on December 20, 1996. A petition for rehearing was denied on February 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Code Section 18.2-36.1 provides in pertinent part:

> Certain conduct punishable as involuntary manslaughter.
>
> A. Any person who, as a result of driving under the influence in violation

of subdivision (ii), (iii), or (iv) of § 18.2-266, unintentionally causes the death of another person, shall be guilty of involuntary manslaughter.

B. If, in addition, the conduct of the defendant was so gross, wanton and culpable as to show a reckless disregard for human life, he shall be guilty of aggravated involuntary manslaughter, a felony punishable by a term of imprisonment of not less than one nor more than twenty years, one year of which shall be a mandatory, minimum term of imprisonment.

STATEMENT

Rodney Wagstaff pleaded not guilty to aggravated involuntary manslaughter under Virginia Code Section 18.2-36.1(B) and was tried by a jury in the Circuit Court of Halifax County on February 23 and 24, 1995. The jury returned a verdict of guilty, and after the sentencing phase of the trial, recommended 15 years imprisonment.

(App., infra, A-3). The case was continued, pending a presentence report, and on July 5, 1995, the trial court sentenced Mr. Wagstaff to 15 years in the penitentiary. (App., infra, A-8). In an unpublished opinion entered on April 25, 1996, (App., infra, A-11), a judge of the Court of Appeals of Virginia denied Mr. Wagstaff's petition for appeal. Mr. Wagstaff demanded consideration of the petition for appeal by a three-judge panel of the Court of Appeals of Virginia pursuant to Virginia Code Section 17-116.05:2(D), and on June 27, 1996, the three-judge panel of the Court of Appeals of Virginia affirmed the original denial of the petition for appeal. (App., infra, A-19). Mr. Wagstaff appealed to the Supreme Court of Virginia, which refused his appeal on December 20, 1996. (App., infra, A-1). On February 28, 1997, the Virginia Supreme Court denied rehearing. (App., infra, A-21).

A. The Trial

On June 28, 1994, Rodney Wagstaff was driving a Ford pickup truck in which his cousin, Michael Wagstaff, was a passenger. Rodney Wagstaff's car collided into the rear of a blue Buick Skyhawk being driven by George Foster in which his daughter, Tracy, was a passenger. Mr. Foster's car propelled forward into an embankment. Rodney Wagstaff's truck flipped over and came to

a stop at the far end of the bridge. Mr. Foster was killed in the accident, and Tracy was injured. Michael Wagstaff was injured, and Rodney Wagstaff was slightly injured.

Michael Wagstaff testified that as the truck travelled on Cowford Road or Route 614, going toward Route 360, next to Rebel's Corner in Halifax County, he asked Rodney Wagstaff to slow down. (Tr. I, p. 43).[1] Rodney Wagstaff took his foot off the gas pedal. (Tr. I, p. 52). Michael Wagstaff stated that he did not know how fast Rodney Wagstaff had been driving (Tr. I, pp. 59-60) but he guessed that it was about 70 or 75 miles per hour. (Tr. I, pp. 44, 60). Michael Wagstaff's last memory before the accident was that the truck was approaching a curve and then a bridge.

According to Michael Wagstaff, Rodney Wagstaff had had six beers that day (Tr. I, p. 48) and had stopped drinking at 4:30 or 4:45. (Tr. I, p. 50). Michael Wagstaff testified that Rodney Wagstaff had been steady on his feet, had not appeared to be intoxicated, had not been "driving like a drunk driver" and had not had any trouble operating the truck prior to the accident (Tr. I, p. 54), that Rodney Wagstaff's

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[1] Citations herein to the three volumes of Transcripts of the Trial of February 23 & 24, 1995, shall be to "Tr. I," "Tr. 2" and "Tr. 3," respectively.

speech was not slurred, and that he did not smell any strong odor of alcohol on Rodney Wagstaff. (Tr. I, pp. 47, 55).

Jerry Coleman testified that he had pulled off the side of Cowford Road when he heard a noise which drew his attention in the direction of the accident. (Tr. I, p. 63). He observed a blue car and then a truck "come flying down the road . . . and he got all the way right up on the" car. (Tr. I, p. 65). According to Mr. Coleman, it appeared that Rodney Wagstaff noticed the car after he got right up on it, jerked the steering wheel and then hit the rear of the car. (Tr. I, p. 66). Mr. Coleman guessed that the truck was travelling at 100 miles per hour. (Tr. I, pp. 69, 75).

Mr. Coleman noticed Rodney Wagstaff pacing at the end of the bridge, crying, and saying that "he wished it was him that he had killed." (Tr. I, p. 70). Rodney Wagstaff was bleeding. (Tr. I, p. 82). Mr. Coleman smelled alcohol on Rodney Wagstaff's breath. (Tr. I, p. 71).

Victor Lacks testified that Mr. Foster's car drove past him as he was driving south on Route 614. Soon after Mr. Foster passed him, Mr. Wagstaff's truck was approaching him, on his side of the road. (Tr. I, p. 101). Mr. Lacks swerved off the road. (Tr. I, p. 101). Mr. Lacks looked in his rear view mirror and saw Mr. Wagstaff collide into Mr. Foster's car. (Tr. I, p. 106).

Mr. Lacks went to the scene of the accident and spoke to Mr. Wagstaff. Mr. Wagstaff was crying (Tr. I, p. 118), and he told Mr. Lacks that he wished he was dead. (Tr. I, p. 115). According to Mr. Lacks, Mr. Wagstaff's eyes were red and he was staggering. (Tr. I, p. 116). Mr. Lacks did not smell alcohol on Mr. Wagstaff's person. (Tr. I, p. 118).

Angela Lacks testified that she was riding in the front passenger seat with Victor Lacks when she saw Mr. Foster's car pass them and then saw a truck coming toward them on their side of the road. (Tr. I, p. 127). She testified that Mr. Wagstaff was driving the truck approximately 90 miles per hour. (Tr. I, p. 132). Ms. Lacks went to call for help. When she returned to the scene, she saw Mr. Wagstaff walking up and down the bridge. She did not see him leave the bridge while she was there. (Tr. I, p. 133).

Trooper R. T. Ridgeway of the Virginia State Police testified that he investigated the accident. He detected an odor of alcohol on Rodney Wagstaff, and Mr. Wagstaff told him he had had three to four beers. (Tr. I, p. 141). Trooper Ridgeway noticed that Mr. Wagstaff was crying, but he did not notice anything unusual about his speech or about his balance or about the way he walked. (Tr. I, pp. 142, 143). He did not administer any field sobriety tests to Mr. Wagstaff. (Tr. I, p. 143). Mr.

Wagstaff did not have any problem getting his driver's license. (Tr. I, p. 144). Mr. Wagstaff did not appear to be confused when he spoke with Trooper Ridgeway. (Tr. I, p. 145).

Trooper D. J. Cline of the Virginia State Police also investigated the accident. He spoke to Rodney Wagstaff at the scene. According to Trooper Cline, Mr. Wagstaff's eyes were bloodshot. (Tr. I, p. 162). Trooper Cline smelled alcohol on his breath. (Tr. I, p. 164). Trooper Cline gave Mr. Wagstaff field sobriety tests to determine whether or not he was intoxicated. (Tr. I, p. 163). The breath test that Trooper Cline gave Mr. Wagstaff indicated a blood alcohol content of .16. (Tr. I, p. 204).

Rodney Wagstaff first told Trooper Cline that he hit a car head on as he was trying to pass a car. (Tr. I, p. 165). He then said that the accident occurred when a car pulled out in front of him. (Tr. I, p. 165). He told Trooper Cline that he had consumed five beers that afternoon and that he had not had anything to drink for about an hour or so. (Tr. I, pp. 168-69). He did not specifically state whether he drank anything after the accident.

Lawrence A. McCormick testified that he spoke with Rodney Wagstaff at the scene of the accident. According to Mr. McCormick, Mr. Wagstaff did not have any problem walking or speaking. (Tr. II, pp. 15, 44). He did not see Mr. Wagstaff

drinking, nor did he see evidence of alcohol at the bridge. (Tr. II, p. 16). He did not smell alcohol on Mr. Wagstaff.

Angie Callahan was a passenger in the car behind Mr. Wagstaff just prior to the accident. (Tr. II, p. 19). She testified that she saw Mr. Foster's car "kind of slanted like it had just pulled out." (Tr. II, p. 22). Ms. Callahan had the impression that Mr. Foster's car had just pulled onto the road because it was in the middle of the road and "sometimes you go in the middle of the road when you're pulling out" and because the car was just beyond where the pull off on the side of the road was. (Tr. II, p. 29). Mr. Wagstaff tried to pass the car, but could not because it was in the middle of the road. (Tr. II, pp. 21, 22). Ms. Callahan acknowledged that she had testified at the preliminary hearing that Mr. Foster's car was "dead set in the middle of the road. . . because I didn't see it pull out." (Tr. II, p. 25). Ms. Callahan testified that she did not see Mr. Wagstaff drink anything after the accident. (Tr. II, p. 28).

Jennifer Lynn Reilly was driving toward Mr. Wagstaff on Route 614 prior to the accident. She testified that Mr. Wagstaff "didn't seem to be going very fast to me." (Tr. II, p. 40).

Karen Clark had been with Mr. Wagstaff just prior to the accident. She did not notice anything unusual about his speech. (Tr. II, p. 48). She did not

see Mr. Wagstaff drinking when she was with him. (Tr. II, p. 48). Ms. Clark was driving the car behind Mr. Wagstaff. She estimated his speed to be about 65 miles per hour. (Tr. II, p. 49). Mr. Wagstaff was not weaving or driving erratically. (Tr. II, pp. 55, 56). Ms. Clark testified that she noticed Mr. Foster's car when she came around the curve. (Tr. II, p. 51). She testified that Mr. Foster's car was directly in the middle of the road, in both travel lanes (Tr. II, p. 52), travelling between 15 and 25 miles per hour.(Tr. II, p. 53). According to Ms. Clark, Mr. Wagstaff started braking and slowing down as he approached Mr. Foster's car. She saw his brake lights come on. (Tr. II, p. 56). He tried to pass Mr. Foster but could not because he would have gone off the bridge. (Tr. II, p. 52).

Ms. Clark approached Mr. Wagstaff after the accident. She did not smell alcohol on him. (Tr. II, p. 58). He was not staggering. (Tr. II, p. 59). He was crying, but his speech seemed to be alright. He was running back and forth from the accident to the woods. (Tr. II, p. 59).

Dewey Watts testified that when he came to the scene after the accident he observed Mr. Wagstaff standing in the woods drinking beer. (Tr. II, p. 99).

Robert Wagstaff, the defendant's father, testified that he spoke to Rodney Wagstaff at the scene after the accident.

He did not smell alcohol on him. (Tr. II, pp. 112-13). Rodney Wagstaff was crying. Robert Wagstaff did not see Rodney Wagstaff drink anything while he was there, nor did he see him leave the road. (Tr. II, p. 114).

The defendant's mother, Kathy Wagstaff, testified that she went to the scene of the accident and was with Rodney Wagstaff for about 10 to 15 minutes. (Tr. II, p. 124). Rodney Wagstaff was crying. His speech was not slurred, he was not staggering, and he did not have an odor of alcohol on him. (Tr. II, p. 123). She did not see Rodney Wagstaff go into the woods nor did she see him drink anything. (Tr. II, p. 127).

Rosalynn Lacks testified that she observed Rodney Wagstaff pacing back and forth when she arrived at the scene about two to five minutes after the accident. (Tr. II, p. 135, 140). While she was there, she observed dark brown beer bottles near Mr. Foster's car, about 10 feet from Mr. Wagstaff's car. Rodney Wagstaff was about five feet from the beer bottles. (Tr. II, p. 137). One of the bottles was partially full and one was empty. (Tr. II, p. 136). Ms. Lacks smelled alcohol coming from the bottles. (Tr. II, p. 138).

Rodney Wagstaff testified that he had had just over five beers to drink on the day of the accident. (Tr. II, p. 150). He stopped drinking "a little after four." (Tr. II, p. 151). He had

no more alcohol after that prior to the accident. (Tr. II, p. 156). He further testified that drinking just over five beers on that day did not affect his vision, his balance, or his ability to think. He did not have any problem driving. He did not feel sick. (Tr. II, pp. 153, 154).

Rodney Wagstaff estimated that he was driving between 65 and 70 miles per hour just prior to the accident. (Tr. II, p. 157). According to Mr. Wagstaff, his truck would not go 90 or 100 miles per hour. (Tr. II, pp. 162-63). He began to brake because he was approaching a "curvy" road. (Tr. II, p. 157). Mr. Wagstaff explained that the accident happened very quickly. Just prior to the accident, he looked up and saw Mr. Foster's car and jerked the wheel. (Tr. II, p. 159).

According to Mr. Wagstaff, just before the accident he did not feel sick, his vision was not blurred, he was able to see normally, he felt in control of the truck and he did not feel drunk. (Tr. II, pp. 159-60). He testified that he did not feel that he was affected by alcohol when he hit Mr. Foster's car. (Tr. II, p. 165).

Mr. Wagstaff crawled out of the truck after the accident. He noticed three beers in his truck. (Tr. II, pp. 160, 169). He explained that he was scared and he wanted to get rid of the

beers so he took them to the woods and drank them. (Tr. II, p. 160).

Mr. Wagstaff explained how the accident occurred and testified that he could not have prevented the accident. (Tr. II, p. 165).

At the conclusion of the prosecution's case and again after all the evidence, Mr. Wagstaff moved the trial court to strike the Commonwealth's case as there was insufficient evidence that he was driving under the influence of alcohol, that he caused the death of another as a result of driving under the influence, or that he engaged in other conduct amounting to a reckless disregard for life. (App., infra, A-23-28, A-32-43). The trial court overruled Mr. Wagstaff's motions to strike, and the case went to the jury. (App., infra, A-28-29, A-42-43).

The jury found Mr. Wagstaff guilty of aggravated involuntary manslaughter under Virginia Code Section 18.2-36.1(B) and recommended a sentence of 15 years in the state penitentiary. (App., infra, A-3). Mr. Wagstaff moved the court to set aside the jury verdict as contrary to the law and the evidence, which motion the trial court denied. (App., infra, A-53). The case was continued pending preparation of a presentence report, and on July 5, 1995, the trial court sentenced Mr. Wagstaff to 15 years in the penitentiary. (App., infra, A-8).

B. The Appeal

On appeal to the Court of Appeals of Virginia, Mr. Wagstaff made four arguments in his brief, including: (1) that the evidence was insufficient to sustain the conviction of aggravated involuntary manslaughter or the lesser included offense of involuntary manslaughter, and (2) that the trial court should have granted a mistrial based on improper statements made by the prosecution during closing argument. (App., infra, A-11). The Court of Appeals rejected Mr. Wagstaff's arguments. (App., infra, A-11). Mr. Wagstaff raised the same two issues in his petition for appeal to the Supreme Court of Virginia, which summarily refused his appeal. (App., infra, A-1, A-21).

REASONS FOR GRANTING THE WRIT

The decision below presents two issues worthy of this Court's review: (1) whether the Fourteenth Amendment's guarantee of due process is violated when a person is convicted of aggravated involuntary manslaughter under Virginia Code Section 18.2-36.1(B) without the evidence necessary to establish the elements of that offense, and (2) whether the Fourteenth Amendment's guarantee of due process is violated when a trial

court refuses to grant a mistrial based on improper statements made by the prosecution during closing argument. In addressing these issues, Virginia's appellate courts have decided important questions of federal law in a way that conflicts with relevant decisions of this Court and which should be settled by this Court.

I. THE FOURTEENTH AMENDMENT'S GUARANTEE OF DUE PROCESS IS VIOLATED WHEN A PERSON IS CONVICTED OF AGGRAVATED INVOLUNTARY MANSLAUGHTER UNDER VIRGINIA CODE SECTION 18.2-36.1(B) WITHOUT THE EVIDENCE NECESSARY TO ESTABLISH THE ELEMENTS OF THAT OFFENSE.

In Jackson v. Virginia, 443 U.S. 306 (1979), this Court stated:

> [A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

> [This] doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury . . . [S]uch an occurrence has traditionally been deemed to require reversal of the conviction.

Jackson, 443 U.S. at 316-17. The burden of proving guilt beyond a reasonable doubt establishes a fundamental and substantive constitutional standard. The jury in the instant case failed to apply rationally the reasonable doubt standard to the facts in evidence. Because the evidence did not establish beyond a reasonable doubt that Mr. Wagstaff was driving under the influence of alcohol or that he caused the death of another as a result of driving under the influence,

his conviction violated the due process guaranteed by the Fourteenth Amendment and must therefore be reversed. Likewise, because there was no independent evidence of conduct amounting to a reckless disregard for human life, his conviction of aggravated involuntary manslaughter violated due process and must be reversed.

In Cameron v. Commonwealth, 211 Va. 108, 175 S.E.2d 275 (1971), the Supreme Court of Virginia stated:

> It is well settled in Virginia that to justify conviction of a crime, it is not sufficient to create a suspicion or probability of guilt, but the evidence must establish the guilt of an accused beyond a reasonable doubt. It must exclude every reasonable hypothesis except that of guilt. The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence.

211 Va. at 110. The evidence in the instant case was not inconsistent with the innocence of Rodney Wagstaff, and there are very reasonable hypotheses except that of guilt, namely, that Mr. Wagstaff was not driving under the

influence of alcohol, that he did not cause the death of another as a result of driving under the influence, and that he did not engage in other conduct amounting to a reckless disregard for human life.

There was insufficient evidence to prove that Mr. Wagstaff committed either aggravated involuntary manslaughter or the lesser-included offense of involuntary manslaughter.

A. Involuntary Manslaughter

To support Mr. Wagstaff's conviction of involuntary manslaughter under Virginia Code Section 18.2-36.1(A), the Commonwealth had to prove (i) that Mr. Wagstaff was driving under the influence of alcohol and (ii) that he caused the death of another person as a result of driving under the influence. The Commonwealth did not prove either of these elements.

There was insufficient evidence to show that Mr. Wagstaff was under the influence of alcohol when the accident occurred. While the Commonwealth's evidence showed that Mr. Wagstaff's blood alcohol content was .16, he successfully rebutted any presumption that he was under the influence of alcohol. The evidence as to his manner, disposition, speech, appearance, coordination, and other factors established that he was not under the influence of alcohol.

Further, even if there were evidence that Mr. Wagstaff was driving under the influence of alcohol, there was no evidence to support the second element, i.e., that as a result of driving under the influence, Mr. Wagstaff caused the death of another person. Section 18.2-36.1(A) requires proof of a causal connection between the driver's intoxication and the death of another person. Pollard v. Commonwealth, 20 Va. App. 94, 455 S.E.2d 283 (1995).

In the case at bar, the Commonwealth offered no evidence to explain the significance of the .16 breath test result with regard to Mr. Wagstaff's reactions, coordination, thinking, speech, and other factors pertaining to his ability to be in control of his person and motor vehicle. In Tipton v. Commonwealth, 18 Va. App. 370, 444 S.E.2d 1 (1994), the Court of Appeals of Virginia reviewed an involuntary manslaughter conviction. There, the Commonwealth introduced into evidence the results of a blood test as well as expert testimony to explain that with such a blood alcohol content, a driver would experience a loss of information processing skills, diminished tracking skills, some loss of peripheral vision, and slowed reaction. Id. at 372-73. Evidence such as that of the expert in Tipton is necessary for a jury to determine whether an accident occurred as a result of a defendant's driving under

the influence. The evidence of Mr. Wagstaff's blood alcohol content, without an explanation as to the effect such a blood alcohol content had on him, was an insufficient basis upon which the jury could make a determination as to Mr. Wagstaff's abilities or inabilities at the time of the accident and whether Mr. Foster's death occurred as a result of his driving under the influence.

Several witnesses testified about Mr. Wagstaff's appearance and manner prior to and subsequent to the accident. A review of the testimony from these witnesses establishes that Mr. Foster's death was not as a result of Mr. Wagstaff's driving under the influence of alcohol. Michael Wagstaff testified that, just prior to the accident, Rodney Wagstaff did not appear to be intoxicated and did not appear to be driving like a drunk driver. He was steady on his feet, he did not have trouble operating the truck, and his speech was not slurred. (Tr. I, pp. 47, 55). Trooper Ridgeway testified that after the accident he did not notice anything unusual about Mr. Wagstaff's speech, balance or the way he walked. Mr. Wagstaff did not appear to him to be confused. Despite Trooper Ridgeway's contact with Mr. Wagstaff, he did not give Mr. Wagstaff sobriety tests. (Tr. I, pp. 142-45). Lawrence McCormick and Karen Clark testified that Mr. Wagstaff did not have problems walking or speaking after the accident. (Tr. II,

pp. 44, 48, 59). Further, Karen Clark testified that Mr. Wagstaff was not weaving or driving erratically just prior to the accident. (Tr. II, pp. 55, 56). Kathy Wagstaff testified that, when she saw Mr. Wagstaff after the accident, his speech was not slurred and he was not staggering. (Tr. II, p. 124).

Rodney Wagstaff testified that he did not feel that the beers that he had had to drink affected his ability to think, his vision or his balance. He did not have any problem driving and he felt in control of his truck. (Tr. II, p. 159).

The manner in which Mr. Wagstaff operated the truck demonstrated that his ability safely to operate it was not affected. Further, Mr. Wagstaff's demeanor before and after the accident demonstrated that he was not under the influence of alcohol to the extent that he would not be able to safely operate the truck. Mr. Wagstaff's operation of the truck and his demeanor establish that Mr. Foster's death was not as a result of Mr. Wagstaff driving under the influence of alcohol.

B. Aggravated Involuntary Manslaughter

To sustain a conviction of aggravated involuntary manslaughter pursuant to Virginia Code Section 18.2-36.1(B), the Commonwealth had to establish that Mr. Wagstaff's conduct was

so gross, wanton and culpable as to show a reckless disregard for human life. This requirement had to be proved in addition to the conduct which establishes a violation of Section 18.2-36.1(A). The conduct relied upon to raise the offense to aggravated involuntary manslaughter must be independent of the conduct upon which the Commonwealth relied to prove involuntary manslaughter.

The conduct which the Commonwealth relied upon to prove that the death was caused as a result of Mr. Wagstaff's driving under the influence was speed. (Tr. II, pp. 262-65). That conduct cannot also be relied upon to enhance the charge to aggravated involuntary manslaughter. That conduct, if the basis for proving that the death was caused as a result of the defendant's driving under the influence, cannot be relied upon to prove that Mr. Wagstaff's conduct was so gross, wanton and culpable as to show a reckless disregard for human life.

Prior to the enactment of Virginia Code Section 18.2-36.1, vehicular involuntary manslaughter was prosecuted pursuant to Virginia Code Section 18.2-36 and was defined as an

> accidental killing which, although unintended, is the proximate result of negligence so gross, wanton, and culpable as to show a reckless disregard of human life.

King v. Commonwealth, 217 Va. 601, 607, 231 S.E.2d 312 (1977). That offense is now prohibited by § 18.2-36.1(B). In Bell v. Commonwealth, 170 Va. 597, 195 S.E. 675 (1938), the Virginia Supreme Court defined those terms which are now part of the language of § 18.2-36.1(B):

> It is most difficult to define and to determine "gross and culpable negligence" in brief terms applicable to every situation. . . . [Gross negligence] is such negligence as may be often best evidenced by a series of acts of commission or omission indicating a state of mind or lack of thought of the offender. The commissions or omissions may be dependent, interdependent, or cumulative, provided there is some causal relation to the state of mind, or to the acts of the offender with the offense charged. The word "culpable," in popular use and acceptation, means deserving of blame or censure. "Gross negligence" is culpable or criminal when accompanied by acts of commission or omission of a wanton or willful nature, showing a reckless or indifferent disregard of the

> rights of others, under circumstances reasonably calculated to produce injury, or which make it probable that injury will be occasioned, and the offender knows, or is charged with the knowledge of, the probable results of his acts.

Id. at 611-12, 195 S.E. at 681.

According to the Court of Appeals of Virginia, the degree of negligence which would support a conviction of vehicular involuntary manslaughter requires a great risk of injury coupled with an objective awareness of that risk on the part of the offender. Keech v. Commonwealth, 9 Va. App. 272, 279, 386 S.E.2d 813 (1989). That degree of negligence is the degree of negligence required to support a conviction pursuant to Section 18.2-36.1(B).

The degree of hazard imposed by Mr. Wagstaff's vehicle was not so gross, wanton and culpable as to show a reckless disregard for human life. There was no evidence that Mr. Wagstaff's actions were of the kind that he or any defendant similarly situated would have known of the dangerous risk he may have been causing.

Because the evidence did not establish beyond a reasonable doubt that Mr. Wagstaff was driving under the influence of alcohol, that he caused the

death of another as a result of driving under the influence, or that he engaged in other conduct amounting to a reckless disregard for human life, his conviction violated the due process guaranteed by the Fourteenth Amendment and must be reversed.

II. THE FOURTEENTH AMENDMENT'S GUARANTEE OF DUE PROCESS IS VIOLATED WHEN A TRIAL COURT REFUSES TO GRANT A MISTRIAL BASED ON IMPROPER STATEMENTS MADE BY THE PROSECUTION DURING CLOSING ARGUMENT.

The prosecution argued in part as follows during the sentencing phase of the trial of this case:

> MR. GREENBACKER: [Mr. Wagstaff] has been indulged by his parents for a long period of time. And I think that came out through this. You saw the way his father reacted at the time of the guilt phase. You saw what he said, very non-communicative during the penalty stage. You saw the way his mother reacted which was very violent. (Tr. III, p. 78).
>
> They blame everyone but Rodney. The troopers are responsible, society is responsible.

Everyone is responsible but their twenty-five year old son who's sitting over there. And they keep propping him up, giving him automobiles, paying for his insurance after all these wrecks that he's had. (Tr. III, p. 79).

. . .

His parents don't think it's fair [that he's been convicted]. They think he's a good boy, his whole family thinks that that's the way it is. (Tr. III, p. 79).

. . .

Do you honestly think his parents are going to stop propping him up? (Tr. III, p. 80).

. . .

. . . If his family had stopped turning a blind eye to all this, Mr. Foster may very well have been here today. But everyone still turns a blind eye even long after the fact. They're still doing it now. (Tr. III, p. 81).

Based on these statements, Mr. Wagstaff made a motion for a mistrial which the trial court denied. (Tr. III, pp. 82-87). The trial court erred in denying Mr. Wagstaff's motion for a mistrial.

This Court has stated that

> where the misconduct of the prosecuting attorney . . . was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential . . . [a] new trial must be awarded.

Berger v. United States, 295 U.S. 78, 89 (1935). See also Caldwell v. Mississippi, 472 U.S. 320 (1985).

> The relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Darden v. Wainwright, 477 U.S. 168, 181 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

In the case at bar, the prosecutor's argument about Mr. Wagstaff's family was improper and inflammatory. These statements suggested to the jury that Mr.

Wagstaff should be held accountable for any shortcomings in the way his family handled him.

It is well established that it is the duty of the Commonwealth's Attorney to prosecute in a fair and impartial manner. Jones v Commonwealth, 196 Va. 10, 82 S.E.2d 482 (1954).

> Nothing should be done or permitted to prejudice the case of an accused, or obscure the minds of the jurors on the question of whether or not he is guilty of the offense charged.

McLane v. Commonwealth, 202 Va. 197, 205, 116 S.E.2d 274 (1960). The Commonwealth is held to the same standard in arguing about punishment to the jury in a bifurcated trial. The Court of Appeals of Virginia has stated that

> [o]ne accused of crime is entitled to have guilt or innocence [and punishment if he be found guilty] determined solely on the basis of the evidence introduced at trial, and not on grounds . . . not adduced as proof at trial.

Winston v. Commonwealth, 12 Va. App. 363, 367, 404 S.E. 2d 239 (1991).

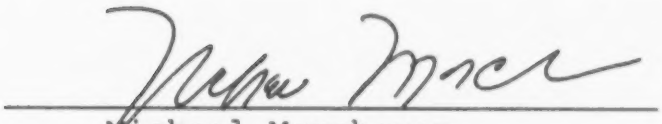
Mr. Wagstaff's sentence should have been based on the facts of his case and "relevant, admissible evidence." See Virginia Code Ann. § 19.2-295.1. It was improper for the jury to have considered the acts, omissions or other conduct of Mr. Wagstaff's parents when it determined Mr. Wagstaff's sentence. The argument of the Commonwealth's Attorney encouraged the jury to consider the conduct of Mr. Wagstaff's parents and to use that conduct as a basis for Mr. Wagstaff's sentence.

The improper statements by the Commonwealth's Attorney were prejudicial to Mr. Wagstaff. The Commonwealth's Attorney repeated several times the theme that Mr. Wagstaff's parents were to blame for his conduct and that they would continue to handle him in the same way. These improper statements were pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. The prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process, and he must be awarded a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Counsel for Petitioner

No. _____

In The

Supreme Court of the United States

October Term 1996

RODNEY WAGSTAFF,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Appendix to Petition for Writ of Certiorari

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 20th day of December, 1996.

Rodney Wagstaff,

Appellant,

against

Commonwealth of Virginia,

Appellee.

Record No. 961536
Court of Appeals No. 1525-95-2

Entered: Friday, December 20, 1996.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of granting of an appeal, the Court refuses the petition for appeal.

Justice Koontz took no part in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF HALIFAX COUNTY

COMMONWEALTH OF VIRGINIA

v.

RODNEY WAGSTAFF

Case #: CR94000392-00 & -01
Offense Date: 6/28/94

Jury Order

Entered: February 24, 1995

This day, February 23, 1995, came the attorney for the Commonwealth and Rodney Wagstaff, dob, 12/31/69, who stands indicted for a felony and an amended misdemeanor, to-wit: (1) Unlawfully and feloniously and with conduct so gross, wanton and culpable as to show a reckless disregard for human life, did unintentionally cause the death of George A. Foster, as a result of driving a motor vehicle while under the influence of alcohol, in violation of § 18.2-36.1 of the Code of Virginia, as amended; (2) Unlawfully did operate a motor vehicle while having a blood alcohol concentration of .10 per cent by weight by volume and 0.10 grams or more per 210 liters of breath, in violation of § 18.2-266 (i) of the Code of Virginia,

as amended, and came also Charles C. Cosby, Jr., his attorney.

Upon the motion of the Attorney for the Commonwealth count #2 in the Indictment is hereby NOL PROSSED.

Whereupon the accused was arraigned and after private consultation with his said attorney, pleaded NOT GUILTY to count # 1 in the Indictment, which plea was tendered by the accused in person.

The Court then impaneled twenty qualified jurors, free from exception for the trial of the defendant. Whereupon the Attorney for the Commonwealth and the Attorney for the defendant each alternately exercised their rights to strike the names of four veniremen from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the evidence was presented by the Commonwealth and the defendant. At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the court to strike the Commonwealth's evidence on grounds stated to the record, which motion was overruled and exception was noted. Court was then adjourned to reconvene on Friday, February 24, 1995 at 9:00 A.M.

On the 24th day of February, 1995 at 9:00 A.M. Court reconvened. At the conclusion of all the evidence, the attorney for the defendant renewed his

motion to strike the Commonwealth's evidence on the same grounds, which motion was overruled and exception was noted.

After hearing the evidence, the instructions of the court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, in the following words:

> We the jury find the defendant guilty of Aggravated Involuntary Manslaughter.
>
> /s/ Bonnie Conner, Foreperson

Upon the motion of the attorney for the defendant, the jury was polled as to whether the stated verdict accurately and correctly reflected their verdict, and all twelve (12) responded in the affirmative.

The defendant, by counsel, moved the court to allow the defendant to plead guilty to the offense and upon hearing the evidence and argument presented and finding it proper so to do, the Court denied the motion.

The Court then heard evidence pertaining to the sentence to be imposed on the verdict The defendant, by counsel, moved the court for a mistrial on grounds stated to the record, which motion was overruled and objection noted.

After hearing the instructions of the Court and the argument of counsel, the jurors were sent to the jury room to consider their sentencing verdict. The jury subsequently returned their sentencing verdict in open Court, in the following words:

> We the jury having previously found the defendant guilty of Aggravated Involuntary Manslaughter now fix his punishment at 15 years imprisonment.
>
> /s/ Bonnie Conner, Foreperson

Upon the motion of the attorney for the defendant, the jury was polled as to whether the stated finding verdict and sentencing verdict accurately and correctly reflected their verdict, and all twelve (12) responded in the affirmative.

The attorney for the defendant then moved the Court to set aside the verdict, for the reasons stated to the record, which motion was overruled and objected noted. The Court affirmed the jury verdict and upon the motion of the attorney for the defendant, before fixing punishment or imposing sentence, the Court directs the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law,

to the May, 1995 term of the Court, to which time this case is continued.

The Court certifies that at all times during the trial of this case the defendant was personally present with his attorney.

And the defendant's bond is revoked and he is remanded to jail.

Enter: 2/24/95

/s/ Charles L. McCormick, III,
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF HALIFAX COUNTY

COMMONWEALTH OF VIRGINIA

vs.

RODNEY WAGSTAFF

Case #: CR94000392-00
Presentence Return
Offense Date: 6/28/94

Entered: July 5, 1995

This day, July 5, 1995, came again the Attorney for the Commonwealth and Rodney Wagstaff, dob, 12/31/69, who stands convicted of a felony, to-wit: (1) Aggravated Involuntary Manslaughter, in violation of § 18.2-36.1 of the Code of Virginia, as amended, and came also his attorney, Charles C. Cosby, Jr.

The defendant, by counsel, moved the court to set aside the jury verdict for the reasons stated to the record, which motion was denied and exception noted.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the accused.

Thereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as part of the record in this case.

Whereupon the Court taking into consideration all of the evidence in this case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer and such additional facts as were presented by the defendant, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the jury verdict is affirmed and the defendant is hereby sentenced to confinement in the penitentiary of the Commonwealth of Virginia for the term of fifteen (15) years, that the defendant submit to mandatory withdrawal of a blood sample for DNA analysis and criminal records exchange purposes, and that the Commonwealth of Virginia is to recover against the said defendant its costs by it and about its prosecution in this behalf expended.

Counsel for the defendant advised the Court the defendant desires to appeal

the judgment rendered, and the Court finding it proper so to do hereby sets the appeal bond at $250,000.00. The conditions of his bond are that he keep the peace and is of good behavior, that he remain alcohol free, that he is placed on intensive supervised probation with random unannounced drug screens to be performed.

The defendant, by counsel, moved the Court for evaluation for the Shock Incarceration program, which motion was denied and exception noted.

The Court certifies that at all times during the trial of this case the defendant was personally present with his attorney.

And the defendant is remanded to jail.

Enter: 7/5/95

/s/ Charles L. McCormick, III,
Judge

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 25th day of April, 1996

Rodney Wagstaff,

Appellant,

against

Commonwealth of Virginia,

Appellee.

Record No. 1525-95-2
Circuit Court No. CR94000392-00

Entered: Thursday, April 25, 1996

From the Circuit Court of Halifax County
Before Senior Judge Duff

This petition for appeal has been reviewed pursuant to Code § 17-116.05:2(C) and is denied for the following reasons:

I. Appellant argues that the copy of the certificate of analysis, which appellant offered into evidence, was inadmissible because the date of attestation was not recorded on the certificate of analysis as required by Code § 18.2-268.9. However, Code § 18.2-268.9 contains no requirement that the

attestation clause must include a date of attestation. The statute requires, among other things, the inclusion of the date and time the breath sample was taken. This information was included on appellant's certificate of analysis. The statute then provides that

> [t]his certificate, when attested by the individual conducting the breath test, shall be admissible . . . .

There is no requirement that the attestation clause include the date of the attestation.

Moreover, Code § 18.2-268.11 provides that substantial compliance with Code 18.2-268.9 is sufficient and that failure to comply with any portion thereof shall go only to the weight of the evidence. Thus, although the state trooper did not fill in the date of the attestation, this did not render appellant's certificate of breath analysis inadmissible. Therefore, the trial judge did not err in admitting the document.

Appellant also asserts that Trooper Cline improperly testified "from" the allegedly inadmissible certificate of analysis that the breathalyzer was properly calibrated when appellant's breath sample was analyzed. However, Cline referred to the Certificate of Instrument Accuracy, Defendant's Exhibit

2, when he testified that the breathalyzer was certified on April 6, 1994 and that this certificate was effective until October 6, 1994. Therefore, appellant's argument is factually inaccurate and is without merit.

II.

> On appeal, we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deductible therefrom.

Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987). Appellant argues that the evidence was insufficient to prove he was under the influence of alcohol when the accident occurred. However, the evidence proved that appellant had a 0.16 blood alcohol content within two hours of the accident. Trooper Cline testified that appellant's eyes were bloodshot, glassy, and had "almost like a wild look" at the scene of the accident. Appellant could not recite the alphabet and failed the horizontal gaze nystagmus test. Cline testified he smelled alcohol about appellant's person. When appellant was informed he was being placed under arrest for driving under the influence, he became belligerent, resisted arrest, and was restrained by

handcuffs. Appellant told Cline he had consumed five beers before the accident, but that he had consumed no alcohol "for about an hour or so."

Other witnesses testified appellant did not appear to be intoxicated. Appellant testified that his vision was not affected and that he did not feel drunk. However, the fact finder believed the testimony of Cline.

> The weight which should be given to evidence and whether the testimony of a witness is credible are questions which the fact finder must decide.

Bridgeman v. Commonwealth, 3 Va. App. 523, 528, 351 S.E.2d 598, 601 (1986). From the evidence, the fact finder could have inferred beyond a reasonable doubt that appellant was under the influence of alcohol when the accident occurred.

Appellant next asserts that there was no evidence that, as a result of being under the influence of alcohol, appellant caused the death of another person. One eyewitness to the accident testified appellant's truck was travelling "no less than a hundred miles per hour" just prior to the collision. Another eyewitness testified appellant was going "[a]t least ninety, ninety five" miles per hour. The evidence proved that appellant's speed contributed to the victim's death when appellant's

truck struck the victim's car, causing it to propel into the bridge abutment and split into two pieces. The evidence also proved that appellant had a 0.16 blood alcohol content, smelled of alcohol, failed the field sobriety tests, and admitted he had consumed five beers prior to the accident. Thus, the proof of intoxication was sufficient to connect appellant's speed with his "impaired perception, retarded reflexes, and disrupted motor coordination." See Pollard v. Commonwealth, 20 Va. App. 94, 99, 455 S.E.2d 283, 286 (1995) (citation omitted). Thus, the evidence was sufficient to prove causation.

Appellant also argues that the conduct required to raise the offense to aggravated involuntary manslaughter must be independent of the conduct relied upon to prove involuntary manslaughter. However, the Commonwealth did not have to prove a separate offense of involuntary manslaughter because appellant was charged with aggravated involuntary manslaughter. In order to convict appellant of aggravated involuntary manslaughter, the Commonwealth was required to prove that appellant, as a result of driving under the influence of alcohol, unintentionally caused the death of the victim, and that appellant's conduct "was so gross, wanton, and culpable as to show a reckless disregard for human life." See Code § 18.2-36.1(B). There is no requirement that

the conduct causing the death must be separate and distinct conduct characterized as "so gross, wanton, and culpable as to show a reckless disregard for human life." Thus, appellant's argument is without merit.

Finally, appellant argues that the evidence was insufficient to prove gross, wanton, and culpable conduct, showing a reckless disregard for human life. From the evidence that appellant drove between ninety and 100 miles per hour, striking the victim's car from the rear with such force that the car slammed into the bridge abutment and was cut into two pieces, the jury could have concluded beyond a reasonable doubt that appellant's conduct was "gross, wanton, and culpable as to show a reckless disregard for human life." See Jetton v. Commonwealth, 2 Va. App. 557, 560, 347 S.E.2d 141, 143-44 (1986). Therefore, the evidence was sufficient to prove beyond a reasonable doubt that appellant committed aggravated involuntary manslaughter.

III.

> [F]ollowing publication of a guilty verdict and its acceptance by the trial court, a plea of guilty is untimely and may not upset the procedural course of a bifurcated trial.

Daye v. Commonwealth, 21 Va. App. 688, 692-93, 467 S.E.2d 287, 289 (1996). After the jury's verdict was read, the trial judge stated,

> [T]he jury having found the defendant guilty of aggravated involuntary manslaughter, we will now move into the sentencing phase of our proceedings.

By this statement, the trial judge impliedly accepted the jury's guilty verdict. Therefore, the determination of guilt became conclusive and appellant's subsequent plea of guilty was untimely, irrelevant, and moot. Id. at 691, 467 S.E.2d at 289.

IV.

> On appeal the denial of a motion for a mistrial will not be overruled unless there exists a manifest probability that the denial of a mistrial was prejudicial.

Harward v. Commonwealth, 5 Va. App. 468, 478, 364 S.E.2d 511, 516 (1988). Counsel has the right to "refer to the evidence and fair inferences from it" in his closing argument. See Timmons v. Commonwealth, 204 Va. 205, 216-17, 129

S.E.2d 697, 705 (1963). The Commonwealth's Attorney referenced the testimony of appellant's parents and the fair inferences that could be drawn from their testimony. The trial judge, in the exercise of his discretion, saw no impropriety in the remarks, and having the opportunity to observe the entire situation and attending circumstances, concluded that appellant had a fair and impartial trial. No manifest probability was shown that appellant was prejudiced by the trial judge's denial of appellant's motion for a mistrial. Accordingly, the trial judge did not abuse his discretion in denying the motion for mistrial.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17-116.05:2(D).

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 27th day of June, 1996.

Rodney Wagstaff,

Appellant,

against

Commonwealth of Virginia,

Appellee.

Record No. 1525-95-2
Circuit Court No. CR94000392-00

Entered: Thursday, June 27, 1996

From the Circuit Court of Halifax County

Before Judge Benton, Retired Judges Gates and Stewart*

For the reasons previously stated in the order entered by this Court on April 25, 1996, the petition for appeal in this case hereby is denied.

---

*Retired Judges Ernest P. Gates and Robert W. Stewart took part in the consideration of this case by designation pursuant to Code § 17-116.01.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 28th day of February, 1997.

Rodney Wagstaff,

Appellant,

against

Commonwealth of Virginia,

Appellee.

Record No. 961536
Court of Appeals No. 1525-95-2

Entered: Friday, February 28, 1977

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 20th day of December, 1996 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Koontz took no part in the consideration of this case.

A Copy,

Teste:

By: /s/ Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF HALIFAX COUNTY

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

RODNEY WAGSTAFF,

Defendant.

Excerpts of Transcript of Proceedings
before
The Honorable Charles L. McCormick, III
Volume I of III
Taken on: February 23, 1995

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MR. COSBY: Judge, I'd like to make my motion to strike in the morning and draw up a couple of arguments ---

MR. GREENBACKER: Oh, why don't we get it over with now.

THE COURT: I was really in hopes that I could go ahead and get that out of the way this afternoon.

MR. COSBY: You want to get that out of the way, Judge?

THE COURT: Yes.

MR. COSBY: All right, Judge. We move to strike on the basis that there has been no showing that the alcohol was

the proximate cause of this accident. There has been no showing -- because if you look at the jury instruction, it requires certain things that must be proved on both regular involuntary and on aggravated.

On the aggravated you have to show he was operating a motor vehicle, which of course they did. And that at the time he was under the influence of alcohol, which they have attempted to show with the state trooper. But it has to be to a degree which impaired his ability to operate a motor vehicle safely.

Now, the question is what evidence is

there that it impaired his ability to operate a motor vehicle safely? There is no evidence of that. All we have -- matter of fact, much of the evidence from the Commonwealth's own witnesses are that this man was able to walk about at the scene of the accident. The Commonwealth's own witness who the Commonwealth put on vouching for his credibility was Michael Wagstaff who said that from the time of four-thirty until seven o'clock, that they went from cutting grass to the pool, the defendant was operating the vehicle with no problem. They went from there to South Boston through traffic, no problem. They went from there to Mother Hubbard's, no

problem, and finally ended up in this accident.

But after the accident took place, when you look at the evidence, this man was walking around, he's talking, his speech from Officer Ridgeway's point of view was not slurred. We don't know whether with the eyes being red whether that was just from crying. We knew he was crying. Officer Ridgeway said that he was able to communicate with him. Trooper Cline said that he stood on one leg for fifteen seconds and did that fine. He didn't complete the ABC's because he said he didn't know them. We don't know what his educational level is.

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The physical outward appearance of this man was not of someone who was impaired to a degree or to a degree which impaired his ability to operate a motor vehicle. Even if you believe he was under the influence of alcohol, there is another prong here in this case. It has to be more than just under the influence.

What does a point one six mean, what does it mean in the context of this case? Is the Commonwealth asking the Court to assume what a point one six means? How do you know how you're affected by a point one six? What evidence is there what a point one six means or what a point one "0" means or point one one? I mean, is the Commonwealth going to ask

the Court to take judicial notice of that? What evidence was put on by Mr. Greenbacker at all about how this man was impaired?

There is no evidence. All we know is that there was some speed. There's a difference in speed between different people. One said seventy, one said ninety, one said a hundred. But if speed caused the accident, where was the alcohol involved? When you look at how the man acted, he acted pretty well, Judge. He acted well enough to walk to Trooper Cline's vehicle and to answer questions in a rational way. In fact, I

think he did very well on almost every aspect of his coordination. Nobody is saying he was stumbling around or swaying. There were no field tests given, finger to nose, except for the stand on one leg and he did all right on that. So I think there's very little evidence, if none, to show that his ability to operate a motor vehicle was impaired.

They have to show also in these vehicular homicide cases -- let me get my paperwork on that -- proof that the driver's actions were the proximate cause of the injury or death is also necessary. Defense as to the causation element include independent intervening ... (reading) ... unavoidable accidents.

At the stage we're in now, I think that they have failed to prove this impairment and also that his conduct was so gross, wanton and culpable as to show a reckless disregard for human life. And then they try to argue, well, that comes in through the speed. But there's some question about what speed he was going. And the Court knows it's difficult for people always to judge speed.

But under both the aggravated involuntary manslaughter instruction and the involuntary manslaughter under the influence instruction both require not only that he be shown to be under the

influence, but to a degree which impaired his ability to drive a motor vehicle safely. And that second prong they haven't proved, haven't even come close to proving, Judge.

THE COURT: All right.

Mr. Greenbacker?

MR. GREENBACKER: Your Honor, there is a jury instruction from the Model Jury Instructions which I would like to read to you. It says, You have received evidence of the amount of alcohol concentration of the defendant at the time that the chemical test was administered. If at that time the concentration was point one "0" or more, there is a rebuttable presumption that the defendant was under the influence of

alcohol at the time of the alleged offense. This presumption may be rebutted by other evidence.

I propose that that instruction be given.

THE COURT: All right.

Mr. Cosby?

MR. COSBY: Well, I mean, if he's under the influence we've got to jump from that to a degree which impaired his ability to operate a motor vehicle safely. You're not required to prove that in a drunk driving case, you're just required to prove somebody is

under the influence. So what evidence is there about the impairment? Where's any evidence of that?

MR. GREENBACKER: Your Honor, he is presumed under those circumstances to be under the influence of alcohol. Then he goes down the road at speeds variously described between ninety and a hundred miles an hour and plows into someone. I mean, the total absence of judgment and the gross negligence, wanton negligence that is shown in that is enough to sustain this charge and show impairment as well.

THE COURT: Well, I think he's made out his prima facie case, Mr. Cosby, and that's where we are at this point. And the arguments that you have made to me about causation and so forth are

arguments that you are perfectly free to make to the jury. And I really think it is a jury argument. And so I'm going to overrule the motion to strike at this time.

All right.

VIRGINIA:

IN THE CIRCUIT COURT OF HALIFAX COUNTY

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

RODNEY WAGSTAFF,

Defendant.

Excerpts of Transcript of Proceedings
before
The Honorable Charles L. McCormick, III
Volume II of III
Taken on: February 24, 1995

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MR. COSBY: Judge, I have a motion. I don't know if you want to hear that.

THE COURT: All right. I'll go ahead and hear that.

(Pause)

THE COURT: All right. Mr. Cosby, go ahead with your motion.

MR. COSBY: We would move to strike, Your Honor.

The first basis that we have is -- I may have missed something, but it's my understanding and my recollection that when the medical examiner -- he identified a photo of the man that he said was the man who died but that no one in the Foster family identified that man in the photo as the same person that the medical examiner performed his physical examination.

So, it's my position that the Commonwealth has failed in an element of proof to prove that the person named in the indictment, Mr. Foster, is the same Mr. Foster that died that the medical examiner testified to.

So, I move to strike on that basis.

I, also, move to strike --

MR. GREENBACKER: Do you want to take these separately, Your Honor?

THE COURT: I guess so.

MR. GREENBACKER: That's one of the first questions I asked his daughter, if she could identify those two photographs of her father and she said that was her father and she started to cry.

THE COURT: All right.

MR. COSBY: The second motion --

THE COURT: All right. That motion then will

be overruled.

MR. COSBY: The second motion, Judge, is it's our position that the Commonwealth's case has fallen far short of proving involuntary manslaughter.

The evidence -- for some reason they've elected to go under the theory of alcohol as being the factor involved in this case and have not elected to go with speed as being the basis for the involuntary manslaughter or reckless driving, and when you look at the jury instructions they require not only that they prove that the defendant was operating under the influence of alcohol but if you read the Code Section, which is eighteen point two thirty-six point one, it says any person who is as a result of driving under the influence unintentionally causes the death of another person shall be guilty of involuntary manslaughter. The instruction, also, says that at the time he was under the influence of alcohol to a degree which impaired his ability to drive a motor vehicle safely.

It seems like to me that there's a large, gaping hole in the Commonwealth's case when you consider the concept of proximate cause as well as the concept of being impaired in your ability to driver [sic] a motor vehicle safely.

The gaping hole is called a toxicologist.

There is no toxicologist who testified for the Commonwealth what a point one six means. We don't have the foggiest idea what a point one six means. We don't know whether it would be impaired; if so, how it would impair you, would it affect your vision, would it affect your motor control, would it affect your balance, would it affect your hearing, how would it affect a person to be under a point one six.

There's absolutely no testimony about what a point one six means.

So, what that leaves the Commonwealth with is how this man acted.

How did he act?

Standing on one leg, counting to fifteen, no problem, ABCs -- he said he had a problem. He said he had trouble reciting those. The gaze and stigmus -- the officer said it lacked smooth pursuit but he didn't go on to explain what that meant, how intoxicated is that, how do we judge what that means.

Then we have all the testimony of everybody who saw Mr. Wagstaff, both Commonwealth witnesses and defense witnesses.

This man was not impaired. He wasn't impaired at all. He's an alcoholic, Judge. He can drink beer

and not, unfortunately, because of his condition be impaired.

When he drove -- Michael Wagstaff says when he drove the vehicle over to the pool there wasn't any problem. When he drove it to South Boston there's no problem. When he drives over to Mother Hubbard's there's no problem. The witnesses who saw him operating the motor vehicle from Mother Hubbard's to the scene of the accident -- he wasn't weaving, no erratic driving.

At the very scene of the accident the State Police say speech is not slurred. They said that he was understandable, that they could understand what he was saying.

Not only that but Officer Ridgeway said when he walked to his vehicle he didn't notice anything peculiar. Trooper Cline said when he went over to his vehicle there was nothing unusual.

They never gave him the heel-to-toe test. We don't know how he would have performed on that.

They were neglectful. They didn't give him the finger-to-nose test to see if he could touch the tip of his nose.

They really didn't give him any test, but the test that they did give him he did pretty well on.

His overall demeanor was not of someone who was impaired. They didn't say he was somebody who looked they were falling down.

You've seen drunk driving cases, Judge, where a man is impaired to the extent that he's got to hold onto something for his balance, he's swaying on his feet, he's stumbling, he's walking -- has difficulty walking, he's stumbling.

There's none of that. This man is walking around with no problem. He's able to communicate with no problem. This man was not impaired in his ability to drive a motor vehicle.

All you really have in this case is speed. The question is speed.

Did the speed cause this death?

The Commonwealth Attorney hasn't charged speed as a factor. He's hanging his hat on under the influence to a degree which impaired his ability to drive a motor vehicle safely, that as a result of driving under the influence the defendant unintentionally caused the death of George Foster as a result of driving under the influence.

How can anybody say that because he was under the influence that it caused the death of George Foster when all the indicia indicate that this man

was in control of himself, everything except for an accident. We have an accident and speed.

It's our position that the Commonwealth has indicted this man incorrectly, that he should have been indicted for involuntary manslaughter where reckless driving or speed was the causative factor, but they didn't do that.

The reason they didn't do that is because they were trying to go for the whole enchillado, trying to go for the whole thing, trying to get an aggravated situation, twenty years.

So, they got greedy, Judge, and they went with the theory that doesn't stand up. It doesn't hold water and if they wanted to show impairment, why not bring a toxicologist in here, why not have him testify about what this point one six means?

We don't know, except by this man's actions and his actions show clearly there was no impairment.

It, also, shows clearly that if he wasn't impaired, then how could his actions result in the death of George Foster because of driving under the influence?

They don't show that connection, that as a result of driving under the influence the defendant unintentionally caused the death of George Foster.

I mean let's assume that the Commonwealth's evidence -- let's look at it in the light most favorable to the Commonwealth.

Let's assume this man -- and forget about the alcohol. Let's assume he was doing one hundred miles an hour down the road and came around that bend and hit Mr. Foster in the vehicle.

Well, you would be going under the theory of involuntary manslaughter with reckless driving as the cause. People would say the cause of the accident was speed.

Well, what more do we have?

We have the point one six, but we don't know what that means. There's no testimony as to what it means. All we know is that it means on the scale of point one "0" and above that you're under the influence, but we don't know how you're influenced, except by this man's own actions and his appearance, which is pretty daggone good.

So, they haven't shown approximate cause and it's our position that they haven't shown either that his conduct was so gross, wanton, and culpable as to show a reckless disregard for human life.

His witnesses testified that the -- and he testified that the speed was somewhere around

sixty-five or seventy. He doesn't really remember. He said he was braking before he got to the -- after coming around the bend he went through a series of curves and was slowing down.

It's our position that the speed here from the perspective of what our case is does not show gross, wanton, and culpable as to show a reckless disregard for human life.

So, we move to strike the entire case, Judge, and ask the court to dismiss it.

In the alternative we would move to strike -- if the court finds that there was sufficient basis, we move to strike the aggravated part and to let the Commonwealth only go forward on the lesser grade of aggravated -- rather involuntary manslaughter with alcohol being a factor.

But it's our position that the Commonwealth has completely missed the boat on this one, Judge, and they just don't have the evidence they need to prove that he was impaired.

THE COURT: Mr. Greenbacker.

MR. GREENBACKER: Your Honor, Section eighteen point two dash two sixty-nine states that if in any prosecution for a violation of eighteen point two dash sixty-one point one, which is the drunk driving

manslaughter statute or the drunk driving statute or any similar ordinance, the amount of alcohol in the blood of the accused at the time of the alleged offense is indicated by a chemical analysis of the sample of blood done in accordance with these provisions, shall give rise to the following rebuttable presumptions and among those rebuttable presumptions, Your Honor, is that they are driving while intoxicated or under the influence of alcohol if it's point one "0", which was the standard then or above.

That's why when I told you earlier that we had an instruction on that there is an instruction in there -- in the model jury instructions and that says if at the time the concentration was point one "0" or more, there is a rebuttable presumption that the defendant was under the influence of alcohol at the time of the alleged offense.

Now, his rebuttal evidence to that is, you know, Dewey Watts and him getting up here and stating -- saying that the test is unreliable, because he was running down in the woods and drinking afterwards. I mean that's what his rebuttal evidence is.

That's simply a jury question as to whether or

not this presumption has been adequately rebutted.

The statute has four key elements. He has to be driving, his driving has to cause unintentionally the death of another person, and those are givens here, and he has to -- he has to have been under the influence of the alcohol at the time it took place and the fourth component is that his actions evidenced gross recklessness.

Counsel is saying that we have not shown that he was under the influence of alcohol at that time.

We're entitled to this presumption and I think anything beyond that is purely argument.

MR. COSBY: Judge, it's curious that when he recited the elements that he missed the one that I just spent fifteen minutes talking about, which he doesn't seem to think has any importance for some reason, but it says at the time that he was under the influence of alcohol to a degree which impaired his ability to drive a motor vehicle safely.

Let's say the Commonwealth is correct. Let's just hypothetically say that he's correct and that the jury or the Judge, whoever, believes that it was a point one six. They don't buy that this man had any alcohol after the accident.

What does a point one six mean? How do we

equate that with impaired his ability to drive a motor vehicle?

He's forgetting that part. He's figuring, well, if he's understand the influence, that's it.

That's not it or the law would have said all you got to prove is driving a motor vehicle under the influence, unintentionally caused the death, and it was gross, wanton, and culpable, but they added which impaired his his ability to drive a motor vehicle safely and that as a result of driving under the influence he unintentionally caused the death of George Foster.

They haven't showed the result and they haven't showed the impairment.

I mean all of their evidence -- their own evidence shows this man was not impaired. What they've got is speed, Judge. This is not a case of impairment. I don't know how they are going to get to that without having some -- some other evidence. They could have always brought a toxicologist in here from MCV and he could have testified very clearly what we're talking about at different levels, what is a point one "O" mean, what does a point one two mean, what does a point two "O" mean, where are people when they are at these different levels.

For some reason they didn't do that. Maybe they didn't think it was necessary, but I think it's a gaping hole in their case.

Also, the other argument I would make is that this was an unavoidable accident, that he came around the bend, the vehicle pulled out, and he couldn't avoid hitting him, and that he's not guilty as well on that basis.

THE COURT: All right. Mr. Cosby, I'm going let you make those arguments to the jury.

MR. COSBY: All right, Your Honor.

THE COURT: I will deny your motion to strike.

* * * *

MR. COSBY: Judge, there's one thing I needed to put on the record.

THE COURT: All right.

(Whereupon, an off-the-record discussion was had.)

(The following took place outside the presence of the jury at sidebar.)

THE COURT: All right. Go ahead.

MR. COSBY: Judge, the Commonwealth failed to introduce any

evidence as to what the speed limit was in this case on the roadway where the accident occurred.

It's our position that the aggravated part of the involuntary manslaughter should be struck, because they can't prove the gross and wanton part of that offense, because we don't know what the speed limit was and he's saying that the gross and wanton acts are as a result of the speed.

Since we don't know what the speed limit was it's kind of hard to infer whether the speed was excessive.

THE COURT: All right.

MR. GREENBACKER: Your Honor, since the witnesses have testified that it's somewhere between ninety and one hundred miles an hour, the

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Commonwealth's witnesses, I think we don't have to go into that.

It's sufficient.

THE COURT: And then, too, we know, of course, that there is no speed limit in the Commonwealth which exceeds sixty-five miles per hour and that only applies on interstate highways in rural areas, which would, obviously, not apply to this road in question.

So, that motion will be overruled.

MR. COSBY: Okay.

VIRGINIA:

IN THE CIRCUIT COURT OF HALIFAX COUNTY

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

RODNEY WAGSTAFF,

Defendant.

Excerpts of Transcript of Hearing before The Honorable Charles L. McCormick, III
Volume III of III
Taken on: February 24, 1995

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MR. GREENBACKER: Ladies and gentlemen, I'm going to tell you what I submit this evidence shows.

What it shows is that Rodney Wagstaff is a spoiled brat who is now twenty-five years of age. He quit school in the ninth grade ---

MR. COSBY: Judge, I'm going to object to that characterization for the record, Your Honor. I think that's inflammatory and I would object.

MR. GREENBACKER: That's a fair argument, Your Honor, from the Commonwealth's perspective.

THE COURT: All right. I will overrule the objection.

MR. GREENBACKER: He has been indulged by his parents for a long period of time. And I think that came out through this. You saw the way his father reacted at the time of the guilt phase. You saw what he said, very non-communicative during the penalty stage. You saw the way his mother reacted which was violent.

They blame everyone but Rodney. The

troopers are responsible, society is responsible. Everyone is responsible but their twenty-five year old son who's sitting over there. And they keep propping him up, giving him automobiles, paying for his insurance after all these wrecks that he's had. And he has been drinking and generally raising the devil for years and years now.

I'm going to tell you something. Anyone who has become a man and two years ago has to go into a hospital to get cleaned up on booze and comes right back out and starts up drinking again and then goes up and gets arrested in May of 1994 for a DUI and on a speeding charge and then goes out and keeps on drinking and keeps on driving and goes down here and kills a man, kills Mr. Foster, and still won't give up drinking, is a thorough-going incorrigible.

He is really surprised that he has been convicted here. He doesn't think this is fair in his heart of hearts. His parents don't think it's fair. They think he's a good boy, his whole family thinks that that's the way it is.

MR. COSBY: Judge, there's no evidence of that and I would object.

MR. GREENBACKER: Your Honor, he's

presented all these people in here that say they never knew he had an alcohol problem.

THE COURT: All right. Go ahead.

MR. GREENBACKER: Now, think about what that is. The general assembly -- this is a relatively new statute. They have augmented traditional involuntary manslaughter to provide for a twenty-year penalty for people who do things like this. It's relatively new because what they want to do is get these alcoholics who are gross and repeat offenders off the roads of the Commonwealth.

And I submit to you this is exactly the case this statute was meant to be applied in. If Rodney Wagstaff walks out of this with some kind of light sentence, not even an enhanced sentence, do you honestly think that he is going to give up and stop? Do you honestly think his parents are going to stop propping him up?

MR. COSBY: Judge, I'm going to object again as to his parents. This case is about him, not about his parents.

MR. GREENBACKER: Well, I'm saying what his future dangerousness is, Your Honor.

THE COURT: All right, go ahead.

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MR. GREENBACKER: So, I suggest to you, ladies and gentlemen, that this is an awful, awful situation. That fifteen year old girl back there is never going to see her daddy again, forty-three years old, working over here at ABB with a good family and good prospects.

And she's thinking, well, maybe -- I'm a good student, I'll get ahead, I'll go on to college and my daddy will be there and I'll see my parents in my old age.

Mr. Foster can't speak here today, he's dead. But don't ever lose sight of him because if Rodney Wagstaff had faced up to his addiction, if his-family had stopped turning a blind eye to all this, Mr. Foster may very well have been here today. But everyone still turns a blind eye even long after the fact. They're still doing it now.

And the simple fact of the matter is he is a menace, a menace on the roadways and, therefore, a menace to society.

I'm going to ask you tonight to give him twenty years.

THE COURT: All right, Mr. Cosby.

MR. COSBY: Judge, before I argue, I would have a motion outside the presence of the

jury.

THE COURT: All right. Members of the jury, would you mind going back one more time.

NOTE: The jury has left the courtroom whereupon Mr. Cosby states out of the presence of the jury, viz:

JURY OUT

THE COURT: All right. All right, Mr. Cosby, go ahead.

MR. COSBY: Your Honor, Judge, the defense moves for a mistrial based on the argument that Mr. Greenbacker has just made. Let me find the case I want to cite.

Basically, Judge when you look at the case law dealing with closing argument, they're not supposed to incite people's passions, they're not supposed to be inflammatory.

For instance, in Taylor v. Commonwealth, at 180 Va. 413, the defendant's rape conviction was reversed because the prosecutor's argument compared the defendant to an unruly bull. And the prosecutor's argument including references to a savage with a ring in his nose and Hottentot were

improper and the defendant's convictions were reversed.

Here calling this -- basically calling him the name spoiled brat is inflammatory. Basically, when he's talking about his parents, he talks about his parents being bad, his parents not doing right by him, his parents looking the other way. The jury is going to get the idea that they should not only punish Mr. Rodney Wagstaff for what he did but because of his whole family and the way they're reacting toward him. That's the way this argument is coming out and it is improper, Judge, and it's prejudicial and I don't think any kind of cautionary instruction can take that out of the jury's mind.

Also, the whole tenor of the argument is talking about alcoholics in general. We're not talking about alcoholics in general, we're talking about this man. We're not talking about his family and what they have done as far as being wrong. We're talking about punishment solely for Rodney Wagstaff.

And the whole argument that he has made is improper. And we would move for a mistrial.

For instance, there was, in Swift v. Commonwealth, 199 Va., the prosecutor's reference to the defendant as a rat and a snake was cured by the Court's actions. Here, though, I think, when you get into the whole tenure or tenor of his argument about his family and him being a spoiled brat and then looking the other way and not doing anything about it, he's basically asking the jury to punish him for his family as well as for his own actions.

And I think it's -- the whole statement is improper, prejudicial, inflammatory and that a mistrial should be granted.

THE COURT: Well, Mr. Greenbacker, what do you have to say about that?

MR. GREENBACKER: Your Honor, I think it's nothing wrong with calling the defendant a spoiled brat if the evidence showed it.

I didn't ask the defense to put on the parents and all these family member to take the stand and say what they did.

It's a fair comment on their testimony that they are all blind to this situation. And, you know, Your Honor, we have an understanding of

what is proper and what is improper argument during the course of trial. There is nothing beyond that -- improper about calling him that.

These samples -- of course, a lot of the cases he's citing go back a long way when we had much stricter laws about argumentation. But those cases -- those situations were, you know, calling someone a Hottentot with a bone in his nose.

If you call someone a spoiled brat, there's nothing -- that's nowhere near that. I also would point out that if he's got an objection to make that he thinks ought to be the grounds for a mistrial, he's supposed to state it then.

Instead, he makes -- the objections were overruled.

THE COURT: I don't really think calling somebody a spoiled brat is inflammatory. It's more like something you would hear in juvenile court or somewhere like that. I've heard people called a lot worse and I just -- it didn't strike me at all as being inflammatory.

I don't know exactly how to characterize it, but it was almost a paternalistic type of thing. I don't know exactly how to describe it.

But it's nothing that I think inflamed the jury in any way. So --

MR. COSBY: Judge, I would ask the Court also to caution the jury that they are not here -- they're here to consider Rodney Wagstaff. His family is not on trial in this courtroom.

THE COURT: Well --

MR. GREENBACKER: Well, Your Honor, if the blame shifts to Rodney Wagstaff's family, how could that possibly inure to Rodney Wagstaff's detriment?

THE COURT: If they got the impression that the way he turned out really is his family's fault and not his, my guess is it would inure to his benefit. I don't know, but that would be my feeling about it, that maybe Rodney himself is not to blame, that because of the way his family has treated him and protected him and spoiled him and made him a spoiled brat or that -- possibly that would be --

If I were in your position, I would maybe consider that that may inure to his benefit rather than to his detriment. So, I just, I think you're barking up the wrong tree on this one.

MR. COSBY: Note my objection, Judge.

THE COURT: All right. Bring the jury.

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JURY DISCHARGED

MR. COSBY: Judge, I have a motion to set aside the verdict on the grounds that the Commonwealth did not prove proximate cause, that they did not prove that the defendant was under the influence or that he was so impaired as not to be able to safely operate a motor vehicle, that the Court made incorrect rulings -- an incorrect ruling on my motion for a mistrial because of the inflammatory remarks made by -- what I characterize as inflammatory remarks made by Mr. Greenbacker, and all the other reasons that I've set forth in other motions for mistrials and in the various objections that I've made during the course of the trial.

THE COURT: All right. That motion will be denied.